ELEVENTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN

1984

Fourth Session, Thirty-Second Parliament
33 Elizabeth II

Ontario

LEGISLATIVE ASSEMBLY
ASSEMBLÉE LÉGISLATIVE

March, 1984

The Honourable John M. Turner, M.P.P.
Speaker of the Legislative Assembly

Sir,

We the undersigned Members of the Select Committee on the Ombudsman have the honour to submit the attached report.

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ELEVENTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN

PART I Introduction

The Committee met for three weeks in September, 1982. Two weeks of that period was taken with its consideration of the Tenth Report of the Ombudsman and other matters.

During the third week the Committee attended the 1983 Conference of Canadian Legislative Ombudsmen in Vancouver, British Columbia hosted by the B.C. Ombudsman, Dr. Karl A. Friedmann. The conference was well attended by present and former Ombudsmen from Canada, the United States, Scandinavia and Australia. The conference was also attended by persons performing Ombudsman-like functions at the federal and municipal levels in Canada and the United States.

The Committee wishes to take this opportunity to formally congratulate Dr. Friedmann and his staff for the excellent program provided during the conference. The topics provided an effective blend between Ombudsman theory and practical considerations fundamental to an Ombudsman's successful operation.

The program included a session on "The Ombudsman as an Officer of the Legislature: How Ombudsmen and Legislators Relate to Each Other". This Committee's Chairman, Robert W. Runciman, M.P.P. spoke, as did Dr. Robert Elliott, Chairman of the Select Standing Committee on Legislative Offices in Alberta and Arthur Maloney, Q.C., first Ombudsman for the Province of Ontario. The Committee understands that this was the first time where such a discussion was held at a Canadian Ombudsmen Conference with participation by members of legislative assemblies.

The session was both helpful and thought provoking. In particular, it introduced to people unfamiliar with its operation, the unique role played by this Committee. The Committee hopes that this or similarly related topics will be included in all future Canadian Ombudsmen Conferences. It is an area which has been substantially unexplored outside the Province of Ontario. Ironically, a Committee "on the Ombudsman" has the potential to substantially enhance the

effectiveness of the Ombudsman and his relationship with the Assembly he serves. The Committee's concept of the role and functions of an Ombudsman has been enriched as a result of its participation in this conference. The Committee intends in future to encourage its members, wherever possible, to attend and participate in conferences of this nature.

In its Tenth Report the Committee had the following comments respecting the person whom the government would appoint as successor to the Honourable Donald R. Morand:

> "His successor will inherit a high quality operation with the potential to meet almost immediately, the demands of the office and the needs of the people of the Province of Ontario throughout the 1980's. The people of Ontario require the Ombudsman to be seen to perform his functions and perform them well. The new Ombudsman should be a person with the ability to further develop the office as an effective instrument of the people to redress quickly and forcefully the consequence of maladministration by governmental organizations. The Committee hopes that these comments will provide guidance in the appointment of Mr. Morand's successor."

December, 1983 the Premier announced the appointment as the Province's Third Ombudsman of Dr. Daniel Hill, formerly Chairman of the Human Rights Commission of Ontario. This appointment followed a period of almost a year wherein the office was under the control of two temporary Ombudsmen, the first the Honourable Donald R. Morand and subsequently Mr. Morand's Executive Director, Frank McArdle.

The Committee looks forward to its association with Dr. Hill. The expressions of commitment and support that it has made in previous reports with regard to his predecessors apply equally to him.

The Committee regrets that a permanent Ombudsman was not appointed immediately upon Mr. Morand's 65th birthday and that two temporary Ombudsman were required over a twelve month period. This delay has adversely affected the

operation of the office. In the future the Committee is prepared, if requested, to assist in the selection process. It is hoped this offer is accepted.

The Committee continues to see, from a statistical analysis, improvement in the backlog of files and in the time taken to complete files. The millstone of the North Pickering files has now been removed from the Ombudsman's inventory and statistics for the current period should reflect that fact by further reduction in the file duration.

The Committee was also assured by the temporary Ombudsman, Mr. McArdle, that in general terms, all problematic, long duration files have been removed from the Ombudsman's inventory and that in future reporting periods there will be very few files which take 33 months and more to complete. The Committee is prepared to accept these assurances and looks forward to a review of the statistics for the current period to assess whether its concern over durations has finally been resolved.

After more than seven years the Committee is now able to report that the process known as North Pickering has been completed. It is almost trite to say that it has not been completed to everyone's satisfaction. Any process which takes seven years to complete invariably fails to serve or satisfy all of those affected by it.

In his Tenth Report the Ombudsman dealt with eighteen former land owners whom the Minister of Housing refused to compensate notwithstanding recommendations by the Ombudsman to that effect. The Committee's consideration of this matter is detailed in Part IV, page 29 of this Report.

The Committee after consideration of all of the relevant factors and hearing from both the Honourable Donald R. Morand and the Honourable Claude Bennett, Minister of Municipal Affairs and Housing, decided that it was unable to support the recommendations of the Ombudsman.

While as far as the Committee is concerned, the substantive matters raised by North Pickering are at an end, the questions raised concerning the type and length of process employed remain to be answered. In hindsight, the Committee has grave reservations that the Ombudsman should ever have been permitted to further investigate the North Pickering matter by means of the "Hoilett hearings". That process exposed the Ombudsman to much criticism and attack by those who believed that they were not best served by the process. As well, other developments such as those surrounding the Donelly Commission and the applications to the Court doomed the process to failure almost from the beginning.

The Committee intends to explore with Dr. Hill and with his predecessors, the lessons of North Pickering. These lessons should enable the Ombudsman, the Government, the Legislature and the Committee, if faced with similar circumstances, to formulate a process for resolution of the problem with a minimum of time and confrontation.

In January of this year the Committee held a brief introductory meeting with Dr. Hill. At that time various Committee members made suggestions to him of matters to which he might give attention. In particular, the Committee expressed its desire that, hereafter when "recommendation denied" cases are considered by the Committee, the Ombudsman be in attendance to lead the discussion on behalf of his office. Such participation would assist the Committee in gaining further understanding of the reasons for these recommendations. It would underscore the Ombudsman's commitment to these recommendations and provide more equivalent representation to those who appear before the Committee from the governmental organizations concerned. The Committee looks forward to participation by Dr. Hill in this part of its proceedings.

The Committee has adopted a new practice of deliberating conclusions and recommendations immediately after considering each "recommendation denied" case reported by the Ombudsman. Where the Committee, during this initial deliberation, decided to support a recommendation made by the Ombudsman it immediately announced that decision to the governmental organization affected as

well as the recommendation which the Committee would include in its Eleventh Report. The Committee also made it clear to the governmental organizations affected that it expected a response to the Committee's decision and recommendation without undue delay.

The purpose of this procedure is to eliminate the inordinate period of time between the announcement of the Committee's decision supporting an Ombudsman recommendation (previously when its reports were tabled in the Legislature) and the time when the governmental organization implements the recommendation. Under the old system, up to twelve months might elapse between the issuance of the Committee's recommendation and its implementation.

The Committee is pleased to report that in two of the three cases where its decision and recommendation were announced immediately to the governmental organizations (which appear elsewhere in this report) they have already been implemented. The time saving has therefore been dramatic.

The Committee has also adopted a practice whereby, in formulating its recommendations to the Assembly, it will not necessarily adopt the language of the Ombudsman's recommendations. Previously, the Committee has endeavoured where possible, to frame its recommendations identically to the Ombudsman's, thus signifying full support. Unfortunately, some governmental organizations were interpreting and implementing the Committee's recommendations in such a way so as to satisfy the letter of those recommendations but not their spirit.

In the future the Committee will require the Ombudsman to frame his recommendations in language which will eliminate any doubt or ambiguity as to what result is desired. The Committee will not permit itself in the future to become a party to a recommendation which will allow a governmental organization to play technical word games in its interpretation and implementation.

In January of this year, the Committee travelled with representatives of the Ombudsman's office, to North Bay, Cochrane, Timmins, Kapuskasing and the

James Bay communities of Attawapiskat, Fort Albany, Moose Factory and Moosonee. The purposes of the trip were to study, first hand, the operation of the Ombudsman in Northern Ontario, particularly as it affects our native population, and to establish personal contacts with the peoples of the various northern communities.

The experiences gained during the visits to the various communities have underlined some fundamental principles which the Committee intends to apply, where appropriate, in the future. The importance of travel to the fulfillment of Committee's term of reference is one such principle. The insights gained by the first hand experience cannot be duplicated in Committee rooms at Queen's Park.

One regret shared by all Committee members is that the visits were too short. Four days is simply not enought time to fully comprehend and assess the special issues which confront the people of Northern Ontario and to consider how the Ombudsman can assist them. However, the critical first step has been taken. Personal contact has been made with these communities and necessary preliminary questions have been asked. What follows is the Committee's commitment to further and more extensive contacts with the Northern communities to ensure that, in the context of the Ombudsman, his office will not only be, but be seen to be, as accessible and effective for them as it is for the people of the "South".

During its trip though the North, the Committee had the privilege and honour of meeting with Mr. Doug Rickard of Moosonee. In December, 1983 Mr. Rickard, who is 19, exhibited extraordinary courage and resourcefulness in walking for 6 days over 100 miles of rugged Northern Ontario bushland to obtain medical assistance for his stricken mother.

The Committee was moved by his remarkable accomplishment, and on its return to Toronto, directed the Chairman to write on its behalf to the Director of the Chancellery of Canadian Decorations in Ottawa, supporting Mr. Rickard's nomination for the Star of Courage award.

PART II Tenth Report of the Select Committee

(a) Response from the Ombudsman to the Report and Recommendations

The Temporary Ombudsman, Frank McArdle was given the unenviable task of responding to the Committee's Tenth Report. The Committee recognized that it would have been unfair to require any definitive statement or commitment from Mr. McArdle which might prove inconsistent with or contradict the policies and priorities of the permanent Ombudsman. Accordingly, with the exception of the statistical analysis, the matter with which Mr. McArdle is ordinarily closely involved, the Committee did not require the usual full response. Rather, it intends to leave matters such as role of the Ombudsman and his relationship to the Assembly and to this Committee, and the Ombudsman's administrative priorities, to future discussions with Dr. Hill.

The Committee wishes to thank and commend Mr. McArdle and the staff of the Office of the Ombudsman for their advice and assistance during the hearings in September. Once again their contribution contributed greatly to the Committee's ability to complete the many matters on its agenda.

(b) Responses from Governmental Organizations to Recommendations contained in the Report

(1) Ministry of the Attorney-General

The Ombudsman and the Committee have been endeavouring for over two years to have the Attorney-General table a Bill in the Legislature amending the Ombudsman Act, 1975. The Committee in its Tenth Report recommended that:

> "The Attorney-General table, during the 32nd Parliament of this Legislature a Bill amending or otherwise dealing with the Ombudsman Act having regard for the matters contained in the draft bill and policy submission provided by the Ombudsman in January, 1981." (Recommendation No. 4)

The Committee has been advised by a representative of the Attorney-General that it is "fairly likely" that such a Bill will be introduced during the Spring Session of the Legislature in 1984. The Committee expects that the Attorney-General will be able to meet this time commitment. It stands ready therefore to

receive this Bill for the necessary and appropriate consideration after it has been tabled. Until the Bill is tabled Recommendation No. 4 in its Tenth Report remains outstanding.

(2) Ministry of Consumer and Commercial Relations

In its Tenth Report the Committee recommended that:

> "The Liquor Control Board of Ontario undertake such a study and review and report to it as soon as possible on the need for such an outlet. In undertaking this investigation the Board should have regard for the criteria discussed with the Committee on September 8th, 1982." (Recommendation No. 6)

This Recommendation required the Liquor Control Board of Ontario to undertake a study to determine whether a need exists, particularly in Northern Ontario, for the establishment of liquor outlets in retail establishments in municipal airports. The Board declined had to implement the recommendation of the Ombudsman that such an outlet be established in a specific northern municipal airport. The Board lacked, in the Committee's opinion, any actual evidence of the lack of need for such a service. While the Committee did not support the recommendation of the Ombudsman, it nevertheless felt compelled to require the Board to undertake such a study.

The Board through its legal counsel filed with the Committee the results of a study which was undertaken. The study concluded that no real need for such a service exists particularly in the North, and that the needs of the specific Northern community in question are being served adequately by a nearby LCBO outlet. The Committee accepts this report as full compliance with its recommendation.

(3) **Ministry of Health**

(i) **Complaints No. 9 and 10**

In its Tenth Report the Committee recommended that:

> "The Ministry of Health pay that portion of the claims of complainants contained in case summaries 9 and 10 which would have been an insured benefit had the operation been performed by a physician. The Committee further recommends that Section 43 of Regulation 323/72 of the Health Insurance Act, 1972 be amended to permit the General Manager to determine the amount of payment for exceptional cases or medical procedures performed by persons in possession of the necessary hospital privileges who are not physicians. The Committee intends that these recommendations apply only to members of the Royal College of Dental Surgeons who have obtained the necessary hospital privileges." (Recommendation No. 7)

This recommendation which supported the recommendations of the Ombudsman in the two cases mentioned, is intended to provide O.H.I.P. coverage for medical and related procedures, which would be covered by O.H.I.P. if performed by a physician, when performed in a hospital setting by qualified dentists with hospital privileges.

The Committee was informed that the General Manager of O.H.I.P. will take steps to reimburse the two persons involved in the two complaints as required by the recommendation. When that reimbursement occurs the Committee will consider that that part of its recommendation has been satisfied.

The second part of the recommendation intended to give the General Manager discretion to determine amounts for payment in the future which are not expressly covered by the O.H.I.P. fee schedule then in force. The Committee was advised that as worded the recommendation poses some practical problems for the Ministry. Accordingly, the Ministry has suggested that the Committee accept a process whereby meetings will be held on an annual basis between the Ministry and the Ontario Dental Association to ensure that the relevant O.H.I.P. fee schedule is updated so as to be a comprehensive summary of procedures performed by dental surgeons in hospitals. The Committee understands that if this procedure is invoked it will substantially eliminate the problem which gave rise to the two complaints (a fee schedule which lagged behind actual services performed by dentists in a hospital setting).

The Committee was assured by the Assistant Deputy Minister of Health that this alternate process, both in the intermediate and long term, will accomplish the same results as the Committee intended by its recommendation. The Committee, therefore, relying upon the assurances given by the Ministry of Health, accepts the process suggested by the Ministry as compliance with its recommendation. The Committee intends during its sitting in 1984, to review its status with representatives of the Ministry of Health.

(ii) **Complaint No. 11**

In its Tenth Report the Committee Recommended that:

> "The Board of Chiropractic of Ontario alter its practice of interpretating Section 25(2) of Regulation 228 by requiring applicants for the Ontario Chiropractic Licensing Examination to have taken a course of study containing four academic sessions of nine months separated by three months vacations. The Committee further recommends that the Board of Chiropractic of Ontario acknowledge that the complainant has satisfied a requirement of the regulation in this regard and is therefore eligible to write the Ontario Chiropractic Licensing Examination." (Recommendation No. 8)

This Recommendation supported a recommendation of the Ombudsman intended to permit a complainant to write the Ontario Chiropractic Licensing Examination notwithstanding that he had completed his courses of study by a semester system over three years as opposed to the system in Ontario of four academic years of nine months each separated by three month vacations.

The Committee was informed that in February, 1983 the Board of Directors of Chiropractic unanimously voted that:

> "it be the policy of this Board in Regulation 248, Section 26(2) the "academic year" be interpretated as consisting of nine months in duration more than one of which may be completed consecutively".

The Committee was also informed that the complainant in question in fact wrote the examinations in April, 1983. The Committee accepts the Board's response as full compliance with its recommendation.

(4) Ministry of Labour - Workers' Compensation Board

(i) Complaint No. 38 - Sixth Report of the Ombudsman

In its Tenth Report the Committee recommended that:

> "The Workers' Compensation Board reconvene a hearing on this matter and consider the evidence of the complainant's family physician and the psychiatrist retained by the Ombudsman first hand and thereafter decide whether the policy of benefits should be applied." (Recommendation No. 5)

The Committee made this recommendation after it concluded that during a previous re-hearing of the matter the Appeal Board Panel did not give adequate consideration to the evidence of the complainant's attending physicians including the psychiatrist retained by the Ombudsman, in assessing whether the policy of benefit of the doubt was applicable to the circumstances of this case. The Committee was concerned that the Board had made assessments of the qualification and abilities of certain physicians without ever having considered their testimony in person. The Board advised the Committee that it accepted the recommendation of the Ombudsman and accordingly reconvened a hearing on the 20th of September, 1983. On the 2nd of November, 1983 the Board released its decision wherein after reviewing briefly the evidence of the family physician and the psychiatrist retained by the Ombudsman, which latter evidence it describes as "speculative and inconclusive" decided that the policy of the benefit of doubt did not apply to this case. The Board concluded:

> "on the balance of probabilities, that a causal relationship between (the Complainant's) condition diagnosed as post-traumatic neurosis, and the industrial accident of December 19, 1969, has not been established."

The Board arrived at this decision notwithstanding that it appears that the only medical evidence it considered first hand was from the complainant's physicians who in varying degrees expressed the opinion that the industrial accident in question contributed to the post-traumatic disability. The Board does not appear to have heard or considered any viva voce testimony from any other medical expert that the industrial accident did not cause in any way the post-traumatic symptoms.

The Committee wishes to receive the comments of the Ombudsman before it comes to any final conclusions. However, it does seem to the Committee at this point that the Board is not applying the doctrine of benefit of the doubt as intended. From the brief summary of the evidence as set out in the Board's decision it appears that a classic case for the application of the policy has been made. The Committee will pursue this matter again with representatives of the Workers' Compensation Board as soon as possible.

(ii) **Complaint No. 19**

In its Tenth Report the Committee recommended that:

> "The Appeal Board Panel of the Workers' Compensation Board immediately review its decision of March 12, 1979 to determine the reasonable and actual costs of providing supervision and assistance which the condition of the complainant requires and if necessary increase the amount of the attendance allowance." (Recommendation No. 9)

The Committee also recommended that:

> "The Workers' Compensation Board review, by June 30, 1983, its policy concerning attendance allowances to take into consideration the reasonable cost of providing supervision for those injured workers who, as a result of accident, require someone to be in attendance, in order to provide that supervision." (Recommendation No. 10)

The Board advised the Committee that it accepted both recommendations of the Ombudsman. Pursuant to Recommendation No. 9 an Appeal Board Panel reconsidered its decision of March 12, 1979 and concluded that based

upon the findings the Board has made respecting the complainant's condition and degree of disability, the $280.00 currently received as an attendance allowance was adequate to cover the current costs of commercially available attendance. The Board compared the monthly allowance received to the cost of certain commercial services presumably available within a reasonable distance of the complainant's residence. The Board declined to increase the attendance allowance.

The Ombudsman challenged the conclusions of the Board that suitable services were available to attend the needs of this complainant for the amount of attendance allowance paid. The Committee shares some of the Ombudsman's concern that the Board inquiries were not as complete as required in the circumstances. The Committee is still unable to determine whether or not the Board has properly assessed the actual costs required to meet this complainant's needs regardless of whether those needs are as identified by the Ombudsman or as by the Board. The fundamental problem remains that there are those, including the Ombudsman, who believe that the complainant is receiving an inadequate allowance having regard to the attendance needs his condition has created. To resolve this issue the Committee has accepted suggestions made by representatives of the Workers' Compensation Board. First, if the complainant's wife confirms that she intends to obtain full-time employment, then the Workers' Compensation Board shall fund the entire cost of providing the necessary persons or person to attend to the complainant as his needs require when his wife is out of the home at work.

Secondly, and in any event, the Workers' Compensation Board will immediately assemble a treatment team from their Head Injury and Neurology Clinic and undertake all necessary discussions with the complainant's family physician with a view to reconciling the different views respecting the actual attendance needs of the complainant.

Thirdly, after that reconciliation has been done, the Board shall, at its expense, take all necessary steps to identify and provide an individual to attend the home and render the necessary attendance allowance.

The Committee intends to discuss the Board's implementation of these steps when it next conducts its hearings.

(iii) Complaint No. 20

In its Tenth Report the Committee recommended that:

> "The Appeal Board Panel cancel its decision of July 4, 1979, grant the complainant a new hearing and reconsider his entitlement in this claim exercising the discretion given it under Section 43 of the Workers' Compensation Act." (Recommendation No. 11)

The Committee supported the recommendation of the Ombudsman which was intended to provide the complainant compensation by a permanent disability pension on the basis of the bi-lateral hearing loss suffered as a result of his exposure to hazardous levels of industrial noise.

The Board has advised the Committee that it will comply with the recommendation. To date however the Committee has not received notice of any further decision or action. Accordingly the Committee defers any further discussion of this matter.

(iv) Complaint No. 21

In its Tenth Report the Committee recommended that:

> "The Appeal Board Panel of the Workers' Compensation Board revoke its decisions of October 3, 1978 and grant the complainant the full assessed value of his permanent partial disability pension recognizing the non-organic component of his disability up to the date the complainant left Canada permanently." (Recommendation No. 12)

The Committee also recommended that:

> "The Workers' Compensation Board assess and decide whether the complainant should have continuing entitlement to the increased amount of the pension after the date he left Canada permanently." (Recommendation No. 13)

The Board accepted and in fact implemented Recommendation No. 12. However, the Board misinterpretated Recommendation No. 13 and rescinded the increased pension amount from the date the complainant left Canada permanently. The Board took that step without assessing whether the complainant had ceased to be entitled to the increase. Since the Board has previously taken the position that it cannot adequately assess entitlement without the complainant's attendance in person, it is reasonable to require such an assessment before deciding whether the increased pension amount should be discontinued.

ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD PAY THE COMPLAINANT THE INCREASED PENSION AMOUNT FROM THE DATE HE LEFT CANADA UNTIL SUCH TIME AS IT DECIDES ENTITLEMENT IS NO LONGER APPROPRIATE, BASED UPON A PERSONAL ASSESSMENT OF THE COMPLAINANT EITHER IN CANADA OR IN THE COUNTRY WHERE HE CURRENTLY RESIDES.

(v) **Complaint No. 22**

In its Tenth Report the Committee recommended that:

> "The Workers' Compensation Board reconsider its decision of July 24th, 1980 and its decision of November 9th, 1981 with a view to granting the complainant a temporary supplement to his permanent partial disability award on the basis of a full consideration of all relevant evidence and factors." (Recommendation 14)

This recommendation, was framed in identical language to the recommendation of the Ombudsman The Committee concluded that in assessing entitlement to benefits under Section 43(5) of the Workers' Compensation Act, the Board was required to determine the threshold question of whether "the impairment of earning capacity of the employee is significantly greater than is usual for the nature and degree of his injury". That question can only be determined after a consideation of all relevant evidence and factors and not solely on the basis of a comparison of current earnings to 75% of pre-accident earnings.

The Board advised the Committee that it had accepted its recommendation. It subsequently issued a decision in September 20th, 1983 wherein it purported to have reconsidered all of the relevant evidence and factors but denied the complainant any entitlement to a supplementary award under Section 43(5) of the Act.

The Ombudsman has taken the position that the Board has not complied with the Committee's recommendation since it has failed to award the complainant a temporary supplement. The Ombudsman asserts that the phrase in his recommendation as adopted by the Committee "with a view to granting the complainant a temporary supplement to his permanent partial disability award" places an obligation on the Board to award such a supplement after its reconsideration of its two previous decisions.

The Board on the other hand, states that it has complied with the "letter" of the recommendation. It believes that its only obligation was to reconsider the decisions in question leaving the Appeal Board Panel the full discretion to decide the question of entitlement.

The Ombudsman asserts that even though the language of his recommendation is lacking in precision as to the desired result, it was nevertheless made abundantly clear to the Board both during the investigative process and during the hearings before the Select Committee that the recommendation required the award of some temporary supplement. In the Ombudsman's opinion, the only discretion that was left to the Board was the determination of the quantum of the supplement, not whether one should be paid.

The Committee is thus placed in a position of deciding whether all of the circumstances warrant a restatement of its recommendation so as to best serve the intention of the Ombudsman and of the Committee members who decided to support the Ombudsman in this case. A review of all of the relevant documentation and transcripts of the proceedings has not revealed any lack of understanding and appreciation by the representatives of the Board of the real intention of the

Ombudsman's recommendation. The Board appears to have adopted a technical interpretation of the recommendation and relies upon actions based upon that technical interpretation as constituting total compliance.

The Committee has decided that it should in these circumstances clarify its recommendation. This decision does not prejudice the Board in any way since at all material times it was aware of the desired result. If the Committee accepted the Board's actions as full compliance with the recommendation, it would seriously diminish the effectiveness of the Ombudsman and might well be a party to injustice to the complainant whose claim for a temporary supplement had in substance been supported by both it and the Ombudsman.

ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD REVERSE ITS DECISION OF SEPTEMBER 20TH, 1983 AND GRANT THE COMPLAINANT A TEMPORARY SUPPLEMENT TO HIS PERMANENT PARTIAL DISABILITY AWARD. IT IS UNDERSTOOD THAT THE BOARD RETAINS FULL DISCRETION IN ASSESSING AND QUANTIFYING THE AMOUNT OF SUCH SUPPLEMENT. 2

The Committee has been assured by the Ombudsman and all appropriate members of its staff, that hereafter all recommendations made pursuant to Section 22 of the Ombudsman Act will precisely and comprehensively set forth the result intended. The Committee expects hereafter that where the Ombudsman intends that something be done by the governmental organization in question in respect of the matter of complaint that the "something" be spelled out for all to know and understand.

The Committee will also expect hereafter when it considers recommendations from the Ombudsman that the precise nature of the result intended will be explained to the Committee in order that any recommendation it may decide to make can be framed accordingly. The Committee has decided to defer, for the moment, any further consideration of whether this matter should be embodied in a general rule for the guidance of the Ombudsman in the exercise of his functions.

PART III Tenth Report of the Ombudsman

(a) Statistical Analysis

The statistics reported by the Ombudsman to the Committee generally support trends perceived in recent years. Compared to the previous fiscal year (April 1, 1981 to March 31, 1982) the number of matters (files), fast action and information requests opened during the fiscal period increased by 12% (9567 to 10,754), the number of files opened dropped (3,217 to 3,044) and the number of in-progress cases decreased (1,457 to 1,086). The statistics also support the results claimed by the Ombudsman that the backlog which has existed in previous years is continuing to decrease. The number of matters (files, fast action and information request) closed increased from 10,175 to 11,801.

No useful purpose would be served in summarizing the assurances given by the Temporary Ombudsman that procedures are now in place designed to ensure that the duration taken to complete files in the future (general average or otherwise) will be reasonable and acceptable. The time taken by the office to process to completion matters which the Committee has described previously as involving pure Ombudsmans' functions (mainly jurisdictional complaints) remains one of the Committee's chief concerns. Notwithstanding the commendable efforts of the office in closing more files than ever before and having the lowest number of open files in the history of the office, the fact remains that it still takes too long to get things done.

For example, during the last fiscal period under the category of action described by the Ombudsman as "Inquire", out of a total of 2,054 files closed, 438 took between 13 and 24 months to close, 118 took between 25 and 36 months to close, and 105 took between 37 and 90 months to close. The 661 files taking between 13 and 90 months to close cannot all be explained by reasons "beyond the control of the office". The Committee does not intend to take any further steps at this time save the comments already expressed. It does intend however to discuss this matter during its next formal hearing with Dr. Hill and members of his staff.

(b) **Recommendations in previous Ombudsman Reports and/or Select Committee Reports in respect of which it is expected that some further action will be taken by the governmental organization affected.**

(i) **Ministry of Education**

The Ministry of Education has still not implemented Recommendation No. 23 of the Committee's Third Report:

> "That the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contact of insurance in the indemnity type at a realistic premium which will adequately compensate the pupil for injuries sustained in the case of a peer accident as a result of participation in shop classes and in organized athletic activities."

In its Tenth Report to the Committee advised that the recommendation had been implemented in part by virtue of reason of amendment to The Education Act (Section 8(i)). The Committee also stated that further steps must be taken to ensure that other pupils participating in school programs of the kind mentioned in the recommendation have available insurance coverage in the event of "pure accident". The Committee suggested that this could be accomplished by the implementation of a policy of insurance on a province wide basis funded ultimately by the people of the Province of Ontario. The Committee was advised that this question was placed on the Agenda of the Ministry of Education meeting with provincial educational organizations in mid-October, 1983. The Committee was advised that discussions with these groups was crucial before any steps could be taken to implement the Committee's recommendation. The Committee intends to pursue this matter with Ministry officials during its next hearings.

The Committee is most concerned over the length of time taken by the Ministry of Education to implement its recommendation. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT RECOMMENDATION NO. 23 OF ITS THIRD REPORT BE IMPLEMENTED BY THE MINISTRY OF EDUCATION BY MEANS OF A POLICY OF INSURANCE ON A PROVINCE-WIDE BASIS BEFORE THE END OF 1984.

(ii) **Ministry of Government Services**

Recommendation No. 24 of the Committee's Third Report provided that the Ministry should table appropriate legislation removing the present restriction on total current earnings of a provincial superannuant. Management Board of Cabinet has approved in principle an amendment to the Public Service Superanuation Act which will remove the present provisions requiring a reduction or suspension of pension benefits where a pensioner is re-employed by the Crown. Representatives of the Ministry assure the Committee that the amendment is a priority.

The Committee is of course concerned over the inordinate delay taken to implement this recommendation. It urges the Ministry of Government Services and the government in general to take such steps as necessary to table this amendment as quickly as possible. The Committee will continue to pursue this with Ministry representatives until the amendment is passed.

(iii) **Ministry of Health**

Recommendation No. 27, Committee's Third Report, Recommendation No. 1, Committee's Sixth Report (Public Hospitals Act criteria applicable to applications for appointment to a hospital medical staff)

The Committee is still awaiting enactment of regulations provided to it in November, 1982 which with one exception will comply with its recommendations in this regard. The Committee expects that by its next report its recommendations will be fully implemented.

The Committee is disappointed that the Ministry failed to invite and receive submissions from the public on the matter of appropriate amendments to the Public Hospitals Act and the regulations dealing with the issue of appointment to public hospitals. The Ministry has no plans to seek public opinion at this time since it does not perceive any urgency requiring the issue to be canvassed any further at this time.

Recommendation No. 1, Committee's Ninth Report (Ontario Health Insurance Plan Code R991)

In its Tenth Report, the Committee stated that it:

> "expects hereafter that O.H.I.P. will comply with all aspects of the Committee's recommendation so that all persons who have submitted claims to O.H.I.P. for payment for services rendered outside of Ontario are advised of their right of appeal when they are notified of the decision."

The Ministry of Health is concerned that the Committee's expectations may place an obligation on O.H.I.P. to advise all persons who have submitted claims to O.H.I.P. of their right of appeal. This of course was not the intention of the Committee when it made the recommendation. The Ministry has proposed that hereafter, the General-Manager of O.H.I.P. will inform all who submit claims for payment for out-of-province surgical procedures, of their right to appeal O.H.I.P.'s decision. The Ministry's opinion is that with improved communication arrangements between the medical profession and O.H.I.P., it will be informed in advance of the procedure in substantially all of the cases and will thereby inform the patient in question of his or her right of appeal of the General Manager's decision respecting the application for benefit payments.

The Committee accepts the Ministry's proposal for implementation of this recommendation as specifically set out in the Ministry's letter to its counsel dated September 23rd, 1983.

Detailed Summary No. 40 Ombudsman's Third Report (Nursing Homes Act)

In that recommendation the Ombudsman provided:

> "that the Nursing Homes Act, 1972, be amended in order that provisions be made for the successful candidate for the construction of a new home to make application for conditional licence immediately upon the making of the award to him. This licence should be conditional on compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence."

While the Committee has previously been advised that such an amendment will be forthcoming, it now understands that circumstances now exist which have caused the Ministry to postpone any amendment to that Act. However, to fulfil the spirit of the recommendation, the Minister of Health has proposed an interim arrangement whereby the Ministry will undertake to the Ombudsman that on any call for proposals the Ministry will undertake to the successful proposer that he will be awarded a licence provided that he constructs and establishes the home in question in accordance with Nursing Home Act and the regulations. The Committee understands this interim solution as acceptable to the Ombudsman. The Committee accepts this proposal as well on the understanding that legislation amending the Act will be passed at sometime in the future which will fully satisfy the Ombudsman's recommendation.

(iv) **Ministry of Housing, (Recommendation 3) Eighth Report of the Select Committee (Ontario Housing Corporation Field Manuals)**

Since the Gommittee made this recommendation, it has had series of disscusions with representatives of Ontario Housing Corporation respecting the progress and content of the amendments made to its Field Manuals. It has expressed some concerns that some of the amendments, particularly the introduction of a new "appeal process" may not fully satisfy the rules of administrative fairness.

The General Manager of the Corporation assures the Committee that as the amendments proceed, it would be taking the Committee's concerns, as expressed in its report, into account. Further, the new appeal process is being evaluated and the Corporation will pay particular attention to any problems which have developed particularly with the housing authority sitting as its own "Court of Appeal".

The Committee defers any further comment on this matter until the amendments to the Manual have been completed and reviewed against its recommendation.

(v) **Ministry of Treasury and Economics, Recommendation No. 34, Committee's Third Report (Amendment to the Audit Act and Financial Administration Act)**

This recommendation initially was made to the Ministry of Government Services. The Ministry felt that unless it could identify a lawful authority or legal obligation it had no power to pay any monies to a complainant as recommended by the Ombudsman pursuant to Section 22 of the Ombudsman Act.

In its Tenth Report the Committee reported certain preliminary discussions with representatives of the Treasurer concerning an appropriate amendment to the Financial Adminstration Act. The Committee is pleased to report that a proposed amendment has been settled. It will be placed in the Ombudsman Act rather than the Financial Administration Act. It was agreed by all concerned that the amendment to the Ombudsman Act provided a more practical solution to the apparent absence of legal authority. It remains for this amendment to be tabled and passed. It has been noted earlier in this report that the Attorney-General will probably be tabling a Bill amending the Ombudsman Act during the Spring session of the Legislature. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE AMENDMENT TO THE OMBUDSMAN ACT SET OUT IN SCHEDULE 1 TO THIS REPORT BE INCLUDED IN THE BILL WHICH THE ATTORNEY-GENERAL WILL TABLE IN THE LEGISLATURE AMENDING THE OMBUDSMAN ACT. 4

(vi) **Ministry of Labour - Workers' Compensation Board**
Recommendation No. 31 - Third Report of the Select Committee

The Workers' Compensation Board still has not caused an amendment to be made the the Workers' Compensation Act providing for a statutory authority to recover or write-off overpayments made to claimants. The Committee has been advised on a regular basis that while the Board is committed to the amendment it cannot predict when such will occur. The Committee understands that the principal reason for the delay in amending the legislation is the more fundamental issue of Workers' Compensation in Ontario as raised by Professor Weiler in his recent report. The Committee will continue to press the Workers' Compensation Board for an amendment to the Act in a manner which will fully satisfy this recommendation.

PART IV Recommendations denied by Governmental Organizations as Reported in the Tenth Report of the Ombudsman

General

Ordinarily, when the Committee reports on its consideration of "recommendation denied" cases it does so with sufficient detail and reasons so as to enable the reader to gain a full understanding of the Ombudsman's recommendation, the governmental organization's response, and the Committee's conclusions and recommendations, if any.

The Committee during its recent sittings, adopted a new procedure which will, in a number of cases, shorten the waiting period between the Committee's consideration of the matter and the subsequent response of the governmental organization affected to any recommendation which the Committee may make. In three of the cases following (Complaints 7, 21 and 22) the Committee, after considering all of the relevant matters and briefly deliberating, announced that it had passed a motion in each case supporting the recommendation of the Ombudsman and that it would recommend implementation by the governmental organization in its next report to the Legislature. The Committee also advised those affected that it wished a response to its motions and recommendations as soon as possible.

The Committee is pleased to report that the Workers' Compensation Board has accepted the Committee's motions and has taken steps to implement the recommendations framed by the Ombudsman for Complaints 21 and 22.

Accordingly, for these two complaints, the Committee will merely describe briefly the Ombudsman's recommendation, the Committee's motion and the Board's action in implementing it. To fulfill its formal mandate the Committee will also set out the precise recommendation which it passed during its last hearings. The Committee has not yet heard from the Ministry of Consumer and Commercial Relations or HUDAC concerning its motion supporting the Ombudsman's recommendations in complaint No. 7. That matter is therefore reported hereafter in full.

(i) **Ministry of Consumer and Commercial Relations**

Complaint Summary No. 7

This complaint concerned a decision of the Commercial Registration Appeal Tribunal (CRAT) which upheld the position of HUDAC, the corporation designated to administer the Ontario New Home Warranties Plan, that the complainant was not entitled to any payment from the fund to compensate him for losses suffered in the purchase of a new house.

The Ombudsman's investigation disclosed that the complainant entered into an agreement with C. Limited to purchase a home not yet constructed for the amount of $113,500. A $5,000 deposit was paid and the balance was due on closing. Before the home was completed, C. Limited persuaded the complainant to advance a further $40,000 to ensure completion by a specified date. The complainant secured that additional advance by taking back two mortgages on separate properties owned by the President of C. Limited. Subsequent further mortgage arrangements were made which are not material.

Before the home was completed, C. Limited ceased operation and the complainant, to mitigate his losses and preserve his interest in the premises, acquired the property under Power of Sale from a prior mortgagee for $86,500. The complainant spent a further $30,000 to complete the home. In the result, the complainant incurred an additional expense $48,000.

The complainant made application to HUDAC, which advised that it would only consider a payment of $5,000 representing the amount of the original deposit. HUDAC took the position that the further $40,000 paid by way of advance to effect completion as scheduled was not in the nature of deposit as contemplated by the Ontario New Home Warranties Plan Act or its regulations.

The Ombudsman's investigation also raised the issue of whether certain regulations enacted by HUDAC pursuant to the Act were valid. Section 14(1)(a) of the Act provides that:

> "Where... a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;...the person or owner is entitled to be paid out of the guaranty fund the amount of such damage subject to such limits as are fixed by the Regulations."

Section 23 of the Act gives HUDAC the power to enact by-laws which are deemed to be regulations "providing for the establishment and maintenance of the guaranty fund and governing procedures for claiming and determining claims for compensation from the guaranty fund."

Section 6 of Regulation 575/77 provides that:

> (1) "A purchaser who does not become an owner and who has a claim under Clause (a) of Subsection 1 of Section 14 of the Act in respect of a Purchase Agreement is entitled to be paid out of the guaranty fund, for all damages against the vendor for financial loss an amount equal:
>
> (i) to all deposits owing by the vendor to the purchaser under a Purchase Agreement, other than a Purchase Agreement in respect of a condominium dwelling unit, to a maximum limit of $20,000.00."

Section 6 of the Regulations, by limiting entitlement to a "purchaser who does not become an owner" has limited the category of "person" referred to in Section 14, Subsection 1. Rather than limiting only the amount of damage that persons can be paid, the regulation has limited all persons who become owners.

The Ombudsman formed the conclusion that Section 6 of the Regulations was not consistent with and was ultra vires of the Act in that it exceeded the regulatory powers given to HUDAC under the statute. He concluded that HUDAC had the power merely to limit the amount that a person was entitled to receive if he came within the provisions of Section 14 (1)(a), not the classes of person who were so entitled.

He formed the opinion pursuant to the Ombudsman Act that the decision of CRAT to deny the claimant entitlement to payment out of the guaranty fund was wrong and was based on a regulation which appears to have been contrary to law as it derogated, without authority, from a substantive right given by statute.

Accordingly he recommended that:

> "the Tribunal and the Ministry reconsider the law in which the (complainant's) decision was based and take appropriate steps to amend the regulations to comply with the Ontario New Home Warranties Plan Act."

He further recommended that:

> "HUDAC, the Tribunal and the Ministry responsible for the administration of the Act meet and arrange the implementation (of his recommendation), and that appropriate steps be taken to provide for the payment to (the complainant) of his statutory entitlement to compensation."

The Committee understands this latter recommendation is intended to have HUDAC compensate the complainant to the maximum available under the Regulations, $20,000.

The Ministry has declined to take any direct steps since the Plan is administered solely by HUDAC. The Tribunal considers that it lacks authority to act further, since it heard the appeal and decided it on the merits, applying the law as it currently exists. The Committee notes that in dismissing the complainant's appeal CRAT found as a fact that the original $5,000 and the next $40,000 paid to the builder before completion were deposits.

HUDAC has refused to implement the recommendation on the grounds that Section 6 of the Regulations is valid and thus excludes the complainant since he did become an owner of the property. However, before the Committee, HUDAC renewed its offer of $5,000 to the complainant on the basis that those monies were deposits. It continued however to insist that the subsequent $40,000 was not a

deposit. Thus HUDAC has acknowledged that the complainant is entitled to compensation, it just disputes the amount.

The Committee accepts the finding of CRAT on appeal in this matter that the first $45,000 paid by the complainant were deposits. HUDAC is prepared to compensate the complainant for monies which he did pay as deposits. The only issue is one of amount. The Committee considers that HUDAC is bound by the Tribunal's finding on the $45,000 deposit and accordingly its reasons for refusing to implement the Ombudsman's recommendations are neither adequate or appropriate.

The Committee further agrees with the opinion of the Ombudsman that Section 6 of the Regulations is invalid to the extent it purports to limit the class of persons who would otherwise be entitled to claim reimbursement from the fund. HUDAC acted beyond the powers given to it under the Act in excluding persons who have entered into a contract with the Vendor for the provision of a home and have suffered losses resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract but who have subsequently become the owner of the home. There is no rationale for such a distinction. The Committee further understands that HUDAC is currently taking steps to amend the Regulations thus removing the restriction in question.

The Committee supports the substance of the Ombudsman's recommendations in this case. After hearing from representatives of all parties concerned the Committee decided to support the recommendations and announced its recommendations publicly. The Committee has yet to hear from the Ministry, CRAT or HUDAC as to when they will be implemented.

THEREFORE, FOR THE PURPOSE OF THIS REPORT AND IN FULFILLMENT OF THE COMMITTEE'S TERMS OF REFERENCE IT RECOMMENDS THAT THE MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS (MINISTRY) RECONSIDER THE LAW ON WHICH THE COMPLAINANT'S DECISION WAS BASED AND, WITH HUDAC, TAKE ALL APPROPRIATE STEPS TO AMMEND THE REGULATIONS TO COMPLY WITH THE ONTARIO NEW HOME WARRANTIES PLAN ACT. 5

THE COMMITTEE ALSO RECOMMENDS THAT THE MINISTRY AND HUDAC TAKE APPROPRIATE STEPS TO PROVIDE FOR PAYMENT TO THE COMPLAINANT OF HIS STATUTORY ENTITLEMENT TO COMPENSATION UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT. IN THE CIRCUMSTANCES OF THIS CASE THE COMMITTEE CONSIDERS THAT THE SUM OF $20,000 IS AN APPROPRIATE PAYMENT. [6]

(ii) **Ministry of Municipal Affairs and Housing (North Pickering) Complaint Summary No. 24**

The history of the Committee's involvement in what has become known as the North Pickering matter is well documented in its previous reports (First Report, pages 5 to 12; Second Report, pages 1 to 4; Third Report, pages 4 to 14; Fifth Report, page 16; Seventh Report, pages 11 to 21; Eighth Report, page 20 to 29; Ninth Report, pages 24 to 25; Tenth Report, page 17). No useful purpose would be served by reviewing those matters at this time.

In his Tenth Report, by way of summary of the more recent events the Ombudsman stated that:

> " On December 20, 1982 the Ombudsman issued his report entitled "Report of the Ombudsman of Ontario as a result of Certain Complaints in Relation to the North Pickering Project". In it he disclosed that he had reached agreement with the Minister of Municipal Affairs and Housing on a revised settlement proposal under which the majority of complainants (95 of 113) would receive additional compensation for their land from the Province. In essence, the Ministry agreed to update the settlements from the date of appraisal to the date of offer, and to pay the former landowners the difference between the revised market value and the compensation which they had received. The Ministry also agreed to pay interest at the rate of 6% per annum (the rate prescribed by section 35(1) of the Expropriations Act) until a cutoff date.
>
> However, the Ministry did not agree to include in the settlement 18 former landowners who, in its view, "were fully knowledgeable about the value of these properties and made calculated business decisions to complete the sale at the time

> to the Ministry". These 18 landowners came to be known as "investors", in that they were holding relatively large tracts of land (ranging in size from 50 to over 153 acres) for investment purposes. Many of them were companies formed for the purpose of acquiring land from capital provided by individual investors, later selling the land at a profit to those investors.
>
> The Ombudsman acknowledged that these owners were more sophisticated and knowledgeable than the ordinary landowners, and that some of them had considerable experience in buying and selling land. He accepted the Ministry's submission that these landowners made calculated business decisions to sell, rather than to wait for expropriation.
>
> The fact remained, however, that the Government neglected to pay fair market value for these lands, since the appraised values were not updated sufficiently by Project officials. Even "knowledgeable" owners were entitled to receive fair market value.
>
> The Ombudsman noted that, had these owners waited for expropriation and had their claims for compensation determined by the Land Compensation Board, the Board would have had no regard to the character of the owners. He pointed out that if the Government wanted to curb land speculation, it was open to it to introduce appropriate legislation."

As a result of the Ministry's position with respect to the 18 former landowners the Ombudsman formed that opinion, pursuant to Section 22 of the Ombudsman Act, that the Ministry of Housing unreasonably omitted to pay the 18 landowners excluded from the revised settlement proposal, fair market value for their lands. He further formed the opinion that the basis upon which the Ministry seeks to exclude the 18 landowners constitutes improper discrimination under Section 22 of the Ombudsman Act.

He therefore recommended that the 18 landowners be subject to the same terms proposed by the Ministry in its revised settlement proposal. The Committee understands that the terms of compensation as applicable to the lands in question are essentially the difference between the monies paid for the land and the appraised market value increased by 4% a month from the date of the appraisal to

the date that the offer of purchase was made to the landowners plus simple interest of 6% per annum from the date of closing to December 31, 1982. According to the Ministry's calculation the aggregate value of these increases for the 18 landowners is between $3 million and $4 million.

Fundamental to the Ombudsman's opinions and recommendations are his findings that:

1. The landowners did not receive fair market value although the Ministry had promised that all landowners affected would receive that amount for their land;
2. A failure by the Ministry to make full and adequate disclosure of information to the landowners prevented them from making an informed decision on whether to sell or wait for expropriation. This is particularly so with respect to the Ministry's failure to disclose its updating policy of appraisals to landowners when agreements for the purchase of land were being consummated;
3. In no meaningful sense of the term were the landowners willing vendors.

The Minister of Municipal Affairs and Housing has refused to implement the Ombudsman's recommendations. He maintains that these 18 were not ordinary landowners but "sophisticated and knowledgeable investors or persons associated with them who purchased land with a view to selling it later at a profit". He notes that they range

> "from a group of co-venturers making their first investment in property to ten affiliated companies organized in a very sophisticated manner to realize a profit from investing in the speculative property market that existed in Pickering Township in 1969."

He maintains that all of the landowners invested in the land with the ultimate intention of selling it at a profit which was realized when the land was sold to the government.

On the issue of discrimination as found by the Ombudsman the Minister responds that:

> "I can see no injustice or unfair discrimination in refusing to pay further compensation to knowledgeable investors who sold their lands to the government at a profit and thus realized their original investment intention".

The Ombudsman responded that all of the Minister's positions are irrelevant if the 18 landowners failed to receive fair market value on the sale, were unwilling vendors and did not have the benefit of full and adequate disclosure of information at the time when the decisions were taken to sell to the government.

The Committee is unable to support the recommendation of the Ombudsman in this matter. The majority of the Committee decided that the 18 landowners whom the Minister had labeled as speculators should not further profit at public expense.

However, certain members of the Committee expressed concern that rules should not be changed retroactively no matter who might profit thereby and that to pass laws or rules retroactively is to violate a basic principle of justice.

(iii) Ministry of Revenue, Complaint No. 28

This complaint concerns a decision of the Ministry refusing to award the complainant, a summer student employed by the Corporations Tax Branch of the Ministry, an increase in wage from the $4.65 per hour that he accepted at the beginning of his summer employment in the year in question. The complainant's position essentially is that he was entitled to an increase in salary due to his academic qualifications (law student), his previous summer experience with the Corporations Tax Branch, and the level of work he was performing relative to permanent employees earning higher salaries.

After completing his investigation the Ombudsman found that the complainant was employed with the Ministry in an "underfill" as defined by the government's Manual of Administration. The compensation to be paid to a summer student in an underfill position is defined by the manual as follows:

> "Where a student is not required to perform the full range of duties of the assigned position or is subject to different production standards from non-student labour performing the same work, the student may be paid at a rate below that of the minimum rate of pay for the equated classification which:
>
> - shall correspond to a rate in the salary range established for a lower class in the equated series if such lower class exists; OR
>
> - shall be at any rate deemed equitable by the Ministry commensurate with duties performed if no appropriate lower class exists."

However, the Ombudsman concluded that the responsibilities assigned to the complainant were of greater complexity than those assigned to the equated classification identified by the Ministry (Clerk 1). The Ombudsman compared the Clerk 1 responsibilities with the actual duties performed by the complainant and concluded that the complainant performed more responsible and complicated functions.

The Ombudsman formed the opinion that the Ministry's omission to compensate the complainant in accordance with the pay practice outlined in the Ontario Manual Administration was an unreasonable omission within the meaning of the Ombudsman Act. He recommended that:

> "the Ministry's practice of paying summer students on the basis of their educational achievement should be altered to conform to the pay policy outlined in the Ontario Manual of Administration."

He also recommended that the:

> "Ministry re-examine the amount of wages paid to (the complainant) with a view to paying him the salary which would have been due him had the Ministry conformed with the pay practices outlined in the Ontario Manual of Administration."

The Ombudsman intends by the second recommendation that the salary be increased to some appropriate amount as determined by the Ministry.

The Ministry declined to implement the Ombudsman's recommendations on the grounds that its policy of paying summer students conforms to the policy outlined in the Ontario Manual of Administration and that the salary paid to this complainant was equitable commensurate with the duties he performed during the summer in question.

The Ombudsman has interpretated the Ontario Manual of Administration as requiring Ministries, particularly the Ministry of Revenue in this case, to compensate summer students according to the relative complexity of the duties performed and the responsibilities assigned to them. The Ministry of Revenue, on the other hand, assigns duties to summer students in accordance with their academic qualifications and compensates them according to those qualifications. The Ministry does not accept that this part of the Manual of Administration is legally binding on it. In any event, the provision in the manual dealing with underfills is permissive and thus permits the Ministry to compensate summer students based on academic qualifications.

The Committee does not agree with this latter position. The language of the relevant sections of the Manual of Administration is quite clear. Once having adopted the manual as a means of determining compensation for summer students a Ministry is bound to compensate them either under the basic rate of pay formula or by one of the two formulae for underfill positions. In this case the Ministry has failed to compensate under any of the formulae.

However, the Committee reluctantly agrees with the Ministry's position that this portion of the manual is not binding upon it in determining appropriate compensation for summer students.

The Committee also notes that the complainant, a law student, executed a contract of employment wherein he agreed to the conditions including a rate of pay of $4.65 per hour. The Ombudsman found that at the time the employment agreement was entered into the complainant was already aware of the matters which gave rise to his complaint but chose not to raise the issue then. It cannot be said therefore that the complainant was operating under any mistake of fact or that the Ministry failed to disclose a material fact or that he did not possess full information before deciding to execute the agreement.

The Committee therefore does not support the recommendation of the Ombudsman in this case.

(iv) **Ministry of Tourism and Recreation**
Complaint Summary No. 30

This complaint concerns a decision of the advertising and promotion services branch of the Ministry of Industry and Tourism removing the complainant's publication from the Ontario Government's Advertising Program because of an announced printing rate increase. As a result of his investigations, the Ombudsman concluded that the Ministry's decision to remove the complainant's publication from the Government Information/Communication Program was unreasonable, unjust and oppressive. Specifically the criteria of cost efficiency, percentage of Ontario circulation and the number of pages required for tabloid and broadsheet publications receiving advertisements through the program were not uniformly applied. The Ombudsman found that the complainant was dropped from the program for reasons which were not contained in the guidelines and for reasons which were not applied uniformly to other publications.

The Ombudsman accordingly recommended that:

" (a) the Ministry's decision to remove the (publication) from the program be cancelled and the publication be reinstated at a line rate to be negotiated between the Ministry;

(b) the Ministry verify circulation figures for publications currently receiving advertising under the program by obtaining printers' invoices from all publishers, and continue to do so annually;

(c) the Ministry review the administration of the guidelines to ensure equitable treatment for all publications which are eligible for Ontario Government information advertising;

(d) "the Ministry pay (the complainant) compensation reflecting the amount of money he would have received for the advertising he would have received under the program for March 16, 1982. Compensation should be calculated at a line rate of .72¢ less the recognized industry cost for printing advertisements issued through the program. In the absence of an industry recognized cost, the Ministry should calculate the compensation payable to (the complainant) and provide me with its estimated printing costs factor, and the reasons it believes this factor is unfair."

The Committee understands that the amount of compensation intended by the Ombudsman by this last recommendation is in the range of $5,000 to $6,000. The Ministry has implemented the first three recommendations. However it refuses to implement the fourth recommendation on the grounds that the complainant unconditionally chose not to accept the Ministry's advertisements at its stipulated price per line and refused to meet with representatives of the Ministry in an effort to resolve the impasse. In other words, if the complainant had suffered any loss of advertising revenue it was caused by his refusal initially to accept the Ministry's advertising rates and to unilaterally attempt to increase his rates.

The Committee also notes that the placing of advertisements in publications of the type owned by the complainant is at the sole discretion of the Ministry as and when required. Accordingly the complainant had no guaranteed minimum advertising revenue for the period in question.

The Committee is unable to support the fourth recommendation of the Ombudsman. The Ministry has substantially complied with the Ombudsman's recommendations by already implementing the first three. The Committee does not

believe that payment of compensation to the complainant in these circumstances is appropriate or necessary. It also is of the opinion that the response of the Ministry to the Ombudsman's fourth recommendation is both adequate and appropriate. It is surprised and disappointed that the Ombudsman did not form the same opinion.

(v) Ministry of Labour - Workers' Compensation Board

(a) Complaint No. 20

This complaint concerns a decision of the Workers' Compensation Board dated August 17, 1977 denying the complainant entitlement to benefits for a back disability on the grounds that available evidence did not establish an accident or disablement arising out of and in the course of the employment.

The Ombudsman concluded, after his investigation was completed, that evidence indicated that the complainant's degenerative disc disease was aggravated by his work and that available medical opinion established a causal relationship between the aggravation of a degenerative disc disease and the complainant's employment.

Accordingly he formed the opinion pursuant to the Ombudsman Act that the Appeal Board decision that the complainant's back disability was not aggravated by his work was "unreasonable", as evidence clearly indicated a relationship between employment and disability.

He therefore recommended pursuant to Section 22 of the Ombudsman Act that:

> "the Appeal Board revoke its decision dated August 17, 1977 and grant (the complainant) entitlement to benefits for a back disability as arising out of and in the course of his employment."

Before the Committee considered this matter in detail it was informed by the Board that an Appeal Board Panel, upon reconsideration of the August 17,

1977 decision, granted the complainant entitlement for a low back disability on an aggravation basis, which arose out of and in the course of his employment in 1974. Inasmuch as the substance of the Ombudsman's opinion and recommendation is on the basis of aggravation of a pre-existing degenerative condition, the Committee is inclined to accept the Board's response as full compliance with the Ombudsman's recommendation. It will however await formal notification from the Ombudsman that he is satisfied with the response before stating his final position.

(b) Complaint No. 21

This was a case in which the Appeal Board denied a request for a partial commutation of the complainant's permanent partial disability pension. As a result of the Ombudsman's investigation he formed an opinion that the Appeal Board's decisions were unreasonable. He accordingly recommended that the Workers' Compensation Board revoke its decisions and award the complainant the partial commutation he requested.

The Committee, after considering the case and hearing from representatives of both the Ombudsman and the Workers' Compensation Board, decided by motion to support the recommendation of the Ombudsman and passed the following recommendation:

THE WORKER'S COMPENSATION BOARD REVOKE ITS DECISIONS OF OCTOBER 29, 1981 AND DECEMBER 23, 1981 AND AWARD THE COMPLAINANT THE PARTIAL COMMUTATION OF HIS PENSION THAT HE REQUESTED. 7

The Board subsequently advised the Committee that it has accepted the recommendation but decided to commute the complainant's disability award in its entirety rather than partially as the Ombudsman intended. The Ombudsman has informed the Committee that he considers the Board's actions to be both adequate and appropriate. Accordingly this matter is now resolved.

It is worthwhile to note that under the Committee's old procedures it might have taken between twelve and eighteen months to obtain such a response. In this case a response took less than two months.

The Committee notes in this case that the two decisions complained of did not fully set forth the Appeal Board's reasons for denying the complainant partial commutation that he sought. Had sufficient reasons been set out in the decisions it could very well have avoided a complaint to the Ombudsman. In that circumstance the complainant, with full knowledge of the Board's reasons, could have then made submissions to the Board on his own behalf which might have persuaded it to commute the pension. The Board should in its decisions at all levels, set forth all of the reasons for the decision reached.

(c) **Complaint No. 22**

This was a case in which the Appeal Board declined to award the complainant benefits for an injury on the grounds that, at the time of the accident he was not working for a firm covered by the Act. The Ombudsman after completing his investigation, recommended that the Workers' Compensation Board cancel the Appeal Board's decision of December 5, 1973 in order that the complainant be awarded appropriate benefits.

The Committee, after considering the case and hearing from representatives of both the Ombudsman and the Workers' Compensation Board decided by motion to support the recommendation of the Ombudsman and passed the following recommendation. THE WORKERS' COMPENSATION BOARD CANCEL ITS APPEAL BOARD DECISION OF DECEMBER 5, 1973 AND ORDER THAT THE COMPLAINANT BE AWARDED APPROPRIATE BENEFITS. [8]

The Board has subsequently advised the Committee that it has agreed to implement the Committee's recommendation. At present the matter is with the Claims Adjudication Branch of the Board for determination of appropriate benefits. The Ombudsman has advised the Committee that he considers the Board's response to be both adequate and appropriate to his recommendation. The Committee concurs with the Ombudsman. The matter is hereby resolved.

PART V Amendments to the Ombudsman Act and Rules for the Guidance of the Ombudsman in the exercise of his functions under the Ombudsman Act

Earlier in this report (pages 7-8) the Committee reiterated its recommendation to the Attorney-General respecting of the tabling, during the Spring session, of a Bill amending the Ombudsman Act. The Committee will make no further comment on this matter until such a Bill has been tabled. The Committee also does not intend to consider whether any additional rules for the guidance of the Ombudsman should be formulated until the Bill amending the Act has been passed. The Committee also intends to give the new Ombudsman, Dr. Hill, every opportunity of providing imput to the Committee on both questions of amendments and rules.

Further, if the Government accepts the Committee's proposal of assisting in the Ombudsman selection process, then it should consider reflecting that participation in the Bill to be tabled.

PART VI Communications received from the Public

The Committee has adopted a new procedure designed to shorten the period between the receipt of a communication from a member of the public and its actions with respect to that communication. It has created a sub-committee consisting of Messrs. Van Horne, Runciman and Philip for this purpose. Mr. Van Horne has been appointed Chairman. Decisions of the sub-committee must be unanimous.

The sub-committee intends to meet on a regular basis to consider communications from the public, and with the assistance of representatives of the office of the Ombudsman, to decide whether the whole committee should consider the matters raised by a particular communication. The principle followed by the sub-committee in dealing with these communications remain the same as stated by the Committee in its previous reports. Although each communication will be judged on its merits only those will be actively pursued by the Committee which will assist it in fulfilling its order of reference.

If the sub-committee decides that the matter should not be considered by the whole Committee then the member of the public is so advised in writing. If the sub-committee decides that the matters raised by the communication are sufficiently important to require consideration by the whole Committee then that communication will be placed on the Committee's Agenda for business at its next hearings. In this way many persons who communicate to the Committee will be advised relatively quickly, that their communication has been considered by members of the Committee but that the Committee will not take any further steps. If the sub-committee cannot reach a unanimous decision the the matter is automatically referred to the whole Committee. Early indications are that this new procedure will eliminate the Committee's backlog of such communications and with the involvement of members of the Ombudsman's office, will open lines of communication between some complainants and the Ombudsman's office which may have been perceived by the member of the public to be closed.

PART VII Estimates of the Ombudsman

In November, 1983, the Committee considered for the first time the estimates of the Ombudsman. The discussion between members of the Committee and the Temporary Ombudsman, Mr. McArdle, were fruitful. The level of the discussion and the matters raised therein could only have occurred with this Committee, which possesses unique and extensive experience in Ombudsman matters.

Subsequently the Committee considered the Report of the Public Accounts Committee, released in December, 1983 which dealt with the Office of the Ombudsman. Recommendation 6 of that Report states that:

> "The Committee is concerned that the policies of the Ontario Manual of Administration have not been followed by the Office of the Ombudsman. It therefore recommends that the Provincial Auditor review the Office's policies and procedures for compliance with the Manual, and report his findings to the Public Accounts Committee."

This Committee is concerned that a need for such a review exists particularly since in its Second Report (1977) it recommended that:

> "The Ombudsman be required to adopt the Manual of Administration as the manual of his office."

and was subsequently informed by the Ombudsman that the recommendation would be implemented. The Committee intends to pursue this matter with the Ombudsman, the Provincial Auditor and the Public Accounts Committee.

PART VIII Committee's Visits to Northern Ontario

On January 9, 10, 11 and 12th, 1984 the Committee travelled to Northern Ontario visiting the Ombudsman's North Bay Regional Office and some of the vast area in the North which the Ombudsman serves from that office. From North Bay the Committee travelled to Timmins, Cochrane and Kapuskasing meeting with community and municipal representatives. Along the way it visited the North Bay Psychiatric Hospital and the Monteith Correctional Centre. From Kapuskasing the Committee travelled to the communities of Attawapiskat, Fort Albany, Moosonee and Moose Factory. There the Committee met with the native councils where informative, but brief, discussions took place concerning the role of the Ombudsman, the function of the Committee and some of the more pressing concerns of the native peoples.

The Committee was accompanied for a portion of its trip by the Temporary Ombudsman, Mr. McArdle. Mr. McArdle's executive assistant and Mr. Gilles Morin, Director of the Ombudsman's Regional Services accompanied the Committee throughout the trip. The Committee wishes to express its deep gratitude to those from the Ombudsman's office who helped organize the Committee's trip. A particular expression of gratitude is given to Mr. Gilles Morin for his invaluable insights and assistance. The Committee also wishes to express its gratitude to its member Mr. Rene Piche, M.P.P., for his advice and assistance in all phases of the project.

While the Committee did gain insights into the unique circumstances of the people living in the North and the special "problems" which confront their every day lives, it has certainly not become expert. The trip was regretfully too brief. The time constraints imposed on the Committee did not afford an opportunity to engage in the kind of in depth discussions required to gain a full knowledge and understanding of the particular needs which the Ombudsman can and should address.

The Committee visited only the Eastern part of Northern Ontario and one of the Ombudsman's Regional Offices. It is vital that, as soon as practicable, it visit the Western part of Northern Ontario.

In the Committee's opinion the trip established the ground work for discussions with the Ombudsman and certain members of his staff which will further extend the services of the Ombudsman to the people of the North. The establishment of direct personal contact between twelve members of the Legislature and the peoples of the various Northern communities is significant. The Committee realized that as a result of those contacts, the special circumstances confronting the Northern regions will require more attention and involvement by this Committee if the office of the Ombudsman is to become as effective as it is in the South.

While it was impossible for the Committee, within the time allotted for the trip, to develop a sufficient knowledge, expertise or sense of matters to formulate any real conclusions or to make substantive recommendations in this report, the Committee nevertheless is of the opinion that certain observations and suggestions should be made. These observations and suggestions will form the basis of the Committee's continuing commitment to the people of Northern Ontario regarding Ombudsman matters and may serve, after further visits to the North and discussions with its people, to form the basis of recommendations.

These observations and suggestions are not made in any order of priority.

1. The current director of Regional Office of the Ombudsman, Mr. Morin, is a person who possesses a passionate concern for Northern Ontario and its native people in particular. The Ombudsman is well served by his presence in the North. The role of the Director could well be expanded to perform more of the Ombudsman functions. Any such expanded role would tend to strengthen the relationship between the office and the communities.

2. The role and functions of the Ombudsman are not generally known by the native peoples in the West coast settlements of Attawapiskat, Fort Albany and Moosonee. Specifically the community leaders do not seem to realize that the Ombudsman is available as a "last resort" to the people after all of the governmental review and/or appeal processes have been exhausted.

3. The Ombudsman has since the inception of the office acknowledged that the native peoples are a particular group of society that he is committed to serve. However, the Ombudsman "presence" in the far Northern native communities is restricted to approximately four visits annually, each lasting one day on average. The Committee recognizes that there are many reasons why these visits have been so restricted, particularly the need for fiscal restraint. However, the Ombudsman should consider other ways to translate his commitment to the native people into a more permanent presence. The hiring of natives to represent the office while living in the native communities may be one solution. An increase in the utilization by the Ombudsman of the services and facilities available at the regional offices of the Ministry of Northern Affairs and members' constituency offices located in northern Ontario could also create more of a permanence to the Ombudsman in the North.

4. The native peoples regard the Ombudsman's Regional Office in North Bay to be practically as remote from their communities as the office in Toronto. If this is an accurate assessment, then it further underscores the need for the Ombudsman to provide a more direct and continous presence in the native communities. It is very difficult for the Ombudsman and his staff to serve the people of the Province of Ontario with any degree of equality under the present format (Toronto Office and three Regional Offices). The Ombudsman should give consideration to more dispersal of staff to various communities, particularly in the North.

5. Communications between the office of the Ombudsman and inmates or patients in institutions could be more efficient. The Committee is concerned over the length of time passing between the initiation of a complaint by an inmate or patient and the receipt of the Ombudsman's response. The Ombudsman should investigate this matter and take such steps as are available to him to remedy the

situation. Various Committee members have also referred various comments made to them by patients or inmates at the two institutions visited to the Ombudsman without comment or conclusions. The Committee intends to review these matters with the Ombudsman as soon as practicable.

6. Many of the concerns given to the Committee by the native peoples were federal rather than provincial jurisdiction. The problems experienced by the people of Northern Ontario, perhaps more than any other area, bear witness to the need for a Federal Ombudsman.

7. A number of specific concerns expressed by the people of the north although provincial in nature were not currently within the Ombudsman's jurisdiction. The Committee members intend to bring those matters to the attention of the appropriate Ministries concerned in the hopes that the concerns will be addressed.

SCHEDULE 1

SUMMARY OF RECOMMENDATIONS

1. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD PAY THE COMPLAINANT THE INCREASED PENSION AMOUNT FROM THE DATE HE LEFT CANADA UNTIL SUCH TIME AS IT DECIDES ENTITLEMENT IS NO LONGER APPROPRIATE, BASED UPON A PERSONAL ASSESSMENT OF THE COMPLAINANT EITHER IN CANADA OR IN THE COUNTRY WHERE HE CURRENTLY RESIDES. (Page 15)

2. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD REVERSE ITS DECISION OF SEPTEMBER 20TH, 1983 AND GRANT THE COMPLAINANT A TEMPORARY SUPPLEMENT TO HIS PERMANENT PARTIAL DISABILITY AWARD. IT IS UNDERSTOOD THAT THE BOARD RETAINS FULL DISCRETION IN ASSESSING AND QUANTIFYING THE AMOUNT OF SUCH SUPPLEMENT. (Page 17)

3. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT RECOMMENDATION NO. 23 OF ITS THIRD REPORT BE IMPLEMENTED BY THE MINISTRY OF EDUCATION BY MEANS OF A POLICY OF INSURANCE ON A PROVINCE-WIDE BASIS BEFORE THE END OF 1984. (Page 19)

4. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE AMENDMENT TO THE OMBUDSMAN ACT SET OUT IN SCHEDULE 1 TO THIS REPORT BE INCLUDED IN THE BILL WHICH THE ATTORNEY-GENERAL WILL TABLE IN THE LEGISLATURE AMENDING THE OMBUDSMAN ACT. (Page 23)

5. THEREFORE, FOR THE PURPOSE OF THIS REPORT AND IN FULFILLMENT OF THE COMMITTEE'S TERMS OF REFERENCE IT RECOMMENDS THAT THE MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS (MINISTRY) RECONSIDER THE LAW ON WHICH THE COMPLAINANT'S DECISION WAS BASED AND, WITH HUDAC, TAKE ALL APPROPRIATE STEPS TO AMMEND THE REGULATIONS TO COMPLY WITH THE ONTARIO NEW HOME WARRANTIES PLAN ACT. (Page 28)

6. THE COMMITTEE ALSO RECOMMENDS THAT THE MINISTRY AND HUDAC TAKE APPROPRIATE STEPS TO PROVIDE FOR PAYMENT TO THE COMPLAINANT OF HIS STATUTORY ENTITLEMENT TO COMPENSATION UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT. IN THE CIRCUMSTANCES OF THIS CASE THE COMMITTEE CONSIDERS THAT THE SUM OF $20,000 IS AN APPROPRIATE PAYMENT. (Page 29)

7. THE WORKER'S COMPENSATION BOARD REVOKE ITS DECISIONS OF OCTOBER 29, 1981 AND DECEMBER 23, 1981 AND AWARD THE COMPLAINANT THE PARTIAL COMMUTATION OF HIS PENSION THAT HE REQUESTED. (Page 38)

8. THE WORKERS' COMPENSATION BOARD CANCEL ITS APPEAL BOARD DECISION OF DECEMBER 5, 1973 AND ORDER THAT THE COMPLAINANT BE AWARDED APPROPRIATE BENEFITS. (Page 39)